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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 501

HUGHES TOOL COMPANY,

Petitioner,

against

TRANS WORLD AIRLINES, INC.

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

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This brief is filed by respondent Trans World Airlines, Inc. ("TWA") in opposition to the petition of Hughes Tool Company ("Toolco") for a writ of certiorari. Other respondents herein are The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Dillon, Read & Co. Inc., Ben-Fleming Sessel, James F. Oates, Jr., Harry C.

Hagerty and Charles C. Tillinghast, Jr. (collectively referred to as the "additional defendants"). The petition seeks review by this Court of a decision by the United States Court of Appeals for the Second Circuit, reported at 332 F.2d 602 (Appendix B of Petition, p. 7a *et seq.*), which modified and, as modified, unanimously affirmed judgments of the United States District Court for the Southern District of New York (per Metzner, J.) which dismissed with prejudice five counterclaims asserted by Toolco against TWA and the additional defendants in an action which TWA had brought against Toolco and others.

Opinions Below

The judgments and decisions of the courts below are correctly described under the heading "Opinions Below" in the Joint Brief for Additional Defendants-Respondents in Opposition (the "Joint Brief") filed herein by the additional defendants, at pages 2-4.

Counterstatement of Questions Presented

The only questions presented by the petition herein are correctly stated under the heading "Counterstatement of Questions Presented" in the Joint Brief of the additional defendants, at pages 4-5.

Counterstatement of the Case

TWA's complaint, the facts of which stand admitted by reason of Toolco's intentional defaults, seeks relief for violations of the antitrust laws under Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1 (1958), 26 Stat. 209

(1890), as amended, and 15 U.S.C. § 2 (1958), 26 Stat. 209 (1890), as amended) and Sections 3 and 7 of the Clayton Act (15 U.S.C. § 14 (1958), 38 Stat. 731 (1914), and 15 U.S.C. § 18 (1958), 38 Stat. 731 (1914), as amended) and for tortious interference with TWA's business relations. The operative facts alleged in the complaint and admitted by Toolco's wilful default are summarized in the Brief for Respondent Trans World Airlines, Inc. in Opposition filed in No. 443. In that case Toolco and another defaulting defendant, Raymond M. Holliday, seek review of so much of the decision of the Court of Appeals below as affirmed Judge Metzner's decision that TWA's complaint states a good cause of action over which the District Court has jurisdiction and that prior orders of the Civil Aeronautics Board are no defense thereto.

With its answer to the complaint Toolco filed counterclaims against the financial institutions and various individuals named herein as additional defendants pursuant to Fed. R. Civ. P. 13(h). TWA was also named as a counterclaim defendant, although analysis of counterclaims 1 through 5* reveals TWA is a defendant in name only:

> 1. The first counterclaim charges that the alleged course of conduct of the additional defendants in obtaining control of TWA and in causing it to enter into a number of contracts was unlawful, and that the contracts themselves were improvident, negligent or wasteful. Toolco claims to have been damaged and asks for an injunction and an accounting. TWA's participation in the allegedly unlawful

* In a sixth counterclaim naming only TWA, Toolco demanded interest for a five-day period on certain indebtedness of TWA held by Toolco. Judge Metzner granted TWA summary judgment on that counterclaim and the Court of Appeals affirmed, and no review of those decisions is sought by Toolco.

acts is throughout stated to have been while it was under the control of the additional defendants. In substance, this counterclaim follows the pattern customary in actions brought by a stockholder in the name and on behalf of a corporation against its management or persons controlling it for waste of corporate assets.

2. The second counterclaim charges that the same course of conduct violated Section 408 of the Federal Aviation Act of 1958 on the ground that two of the additional defendants, The Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company, acquired control of TWA without advance approval by the Civil Aeronautics Board. This second counterclaim, like the first, is in substance against the additional defendants only, not against TWA.

3. The third counterclaim is expressly derivative in nature and seeks recovery against the additional defendants for violations of the antitrust laws. Basically, the actions complained of are the same ones complained of in the first counterclaim with the further allegation that they were carried on as part of a conspiracy in restraint of trade entered into in or about March, 1960. The injuries to TWA alleged in this counterclaim are in substance the same injuries of which TWA complains in the complaint.

4. The fourth counterclaim alleges the identical facts set forth in the third, but charges that the conspiracy has resulted in injury to Toolco, and alleges that TWA, while under the domination of the other conspirators, has participated in the conspiracy.

5. The fifth counterclaim alleges precisely the same facts, including the conspiracy, as are alleged in the fourth counterclaim, but charges that they constitute a violation of applicable state law.

The foregoing summary of the counterclaims demonstrates that the essential controversy presented by them is between the original defendants in the action—Toolco, Toolco's sole stockholder, Howard R. Hughes, and a principal Toolco executive, Holliday—and the additional defendants. In essence, the counterclaims seek to establish a defense to the complaint by showing that TWA's injuries—the existence of which is admitted by Toolco's counterclaims in terms almost identical with those of the complaint—were caused by the additional defendants. Toolco's attempt is to exonerate itself of the charges in TWA's complaint by placing the blame on others.

As a technical counterclaim defendant, TWA's position in opposing the petition is in most respects identical to that of the additional defendants, just as its position was in most respects identical to that of the additional defendants when the District Court entered the orders dismissing the counterclaims with prejudice and when the Second Circuit modified and affirmed, as modified, the judgments of dismissal. For this reason, and to avoid burdening this Court with unnecessary repetition, TWA adopts the summary of the proceedings below which is contained in "Counterstatement of the Case" set out in the Joint Brief of the additional defendants, at pages 5-17.

Argument

TWA believes that the statement of the proceedings below and the "Argument" based thereon (pages 17-30) which are set out in the Joint Brief of the additional defendants establish overwhelmingly that the petition presents no issue appropriate for consideration by this Court and should be denied. The points made and authorities cited in the Joint Brief are in all respects applicable to the situation of TWA with respect to this

petition, and TWA hereby adopts such "Argument" as its own.

In addition, TWA respectfully refers the Court to its own brief in opposition filed in No. 443 for a discussion of the questions which Toolco has sought to raise as to the alleged primary jurisdiction of the Civil Aeronautics Board.

There is available to TWA as the plaintiff in this action one additional argument which may not be available to the other respondents. Even if Toolco's contention were correct and "there was never a clear ruling by the District Court as to whether the additional counterclaim defendants • • • had • • • an independent right to take Hughes' deposition [on February 11, 1964]" (Petition, p. 19),* this would in no way have diminished or otherwise affected what was the undisputable right of TWA to take Hughes' deposition on that day, notwithstanding Toolco's appended argument (Appendix D of Petition, pp. 41a-47a) that it is somehow free to disregard court orders with which it disagrees.

In any event, and however the orders as to the additional defendants are interpreted, TWA itself had been expressly granted the right to commence its discovery in

* In point of fact, as the Joint Brief of the additional defendants demonstrates, Toolco has either misstated or ignored the effect of various orders entered by the District Court dealing with priority of depositions. No matter how the District Court's order of March 5, 1962 (A86) and the subsequent orders modifying it are read, they cannot be construed as withholding the substantive right of oral examination from the additional defendants until after TWA had completed its oral discovery. Procedurally, counsel for TWA might have had the right to be the first to ask questions of a particular witness, but the right of the additional defendants "to participate in" depositions conducted by plaintiff (A87) can only mean that the substantive right to examine Hughes matured for the additional defendants at the same time it matured for TWA. There can be no doubt (and the Court of Appeals certainly had none) that both the Special Master and the District Court so interpreted their own orders.

aid of its complaint through the oral examination of Hughes commencing February 11, 1963.

There can be no distinction between the allegations of fact contained in the complaint and the allegations of fact contained in the so-called counterclaims insofar as concerns the scope of the examination to which TWA was entitled. Obviously, TWA would have had the right to explore the allegations of the so-called counterclaims as a major part of its examination in chief of Hughes. Moreover, not even Toolco has the effrontery to state explicitly what it seems to imply: that a counterclaiming defendant should have the right to continue prosecution of a counterclaim, or to dismiss it without prejudice over plaintiff's objection, while at the same time refusing, in deliberate and wilful disobedience of court orders, to accord to plaintiff either oral or documentary discovery.

Conclusion

For the reasons stated in the Joint Brief of the additional defendants, and for the additional reasons special to TWA set out herein, the petition presents no issue appropriate for consideration by this Court and should be denied.

Respectfully submitted,

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